FOR ARGUMENT

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Nos. 76-1471, 76-1521, 76-1595, 76-1604
76-1624, 76-1685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1521

CHANNEL TWO TELEVISION COMPANY,
THE HOUSTON POST COMPANY,
CHRONICLE BROADCASTING COMPANY,
THE CHRONICLE PUBLISHING COMPANY,
KSL, INCORPORATED (DESERET NEWS),
POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
THE WASHINGTON POST COMPANY,
WHAS, INC. (THE COURIER-JOURNAL AND
THE LOUISVILLE TIMES),
Petitioners,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS CHANNEL TWO TELEVISION COMPANY, ET AL.

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v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

No. 76-1595

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v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

No. 76-1604

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, *Petitioner*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

No. 76-1624

ILLINOIS BROADCASTING CO., ET AL., *Petitioners*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

No. 76-1685

THE POST COMPANY, ET AL., *Petitioners*

v.

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REPLY BRIEF FOR PETITIONERS CHANNEL TWO TELEVISION COMPANY, ET AL.

ARGUMENT

Four answering briefs [1] urge reversal of the Commission's decision to continue its policy of renewing the licenses of existing newspaper-broadcast cross-owners whose broadcast performance has served the public interest, absent a showing of a need for change. These briefs at least make clear that, whatever this Court's disposition of the Commission's grandfather rules, the holding of the Court of Appeals that broader divestiture was required cannot stand. The Solicitor General's brief affirmatively so argues (Brief for the United States at 52), and expressly recognizes that the Commission has discretion under the public interest standard of the Communications Act to adopt such grandfather rules so long as its decision is rationally explained. (*Id.* at 18). Except for the contention of amicus National Emergency Civil Liberties Foundation that the Communications Act should be reinterpreted to prohibit all licensing of cross-owners on the theory that such licensing abridges the freedom of speech, none of the briefs contends that the Commission lacks the authority to grandfather as it did. And none attempts to reconcile the court's holding requiring broader divestiture with decisions of this Court such as *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940),[2] or with the standard of review prescribed in

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[1] Brief for the United States; Brief of Respondent National Citizens Committee for Broadcasting (hereinafter cited as "NCCB Brief"); Brief of National Emergency Civil Liberties Foundation, *Amicus Curiae;* and Brief *Amici Curiae* of the Office of Communication of the United Church of Christ, *et al.*

[2] *See also, e.g.*, South Prairie Construction Co. v. Local No. 627, Int'l Union of Operating Engineers, 425 U.S. 800, 806 (1976); NLRB v. Food Store Employees Union, 417 U.S. 1 (1974); FPC v. Idaho Power Co., 344 U.S. 17, *rehearing denied,* 344 U.S. 910 (1952).

Citizens to Preserve Overton Park, Inc. v. *Volpe,* 401 U.S. 402 (1971).

Accordingly, the decision of the Court of Appeals must be reversed, and the only substantial question before this Court involving existing cross-ownerships is whether the Commission's grandfather rules should also be affirmed. The Solicitor General contends that, although the Commission had discretion to grandfather existing cross-ownerships, and could properly have done so in this case for "an articulable reason reflecting consistent analysis of the public interest" (Brief for the United States at 18), a remand is nonetheless required on the ground that the Commission failed adequately to explain its reasons for grandfathering in this case.

It is true that the Commission is required to say enough in exposition of a public interest policy determination to show that it is not irrational in substance and is based on consideration of relevant public interest factors. *Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra,* 401 U.S. at 416. But reviewing courts do not sit to instruct agency opinion-writers in the art of legal writing. "Under the 'arbitrary and capricious' standard the scope of review is a narrow one." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 285 (1974), *rehearing denied,* 420 U.S. 956 (1975). While a court "may not supply a reasoned basis for the agency's action that the agency itself has not given, . . . [it] will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* at 285-86; *Colorado Interstate Gas Co.* v. *FPC,* 324 U.S. 581, 595, *rehearing denied,* 325 U.S. 891 (1945); *Kurzon* v. *United States*

Postal Service, 539 F.2d 788, 792-93 (1st Cir. 1976); *Hooker Chemicals & Plastics Corp.* v. *Train,* 537 F.2d 620, 632 (2d Cir. 1976). It is a conspicuously inefficient use of scarce federal judicial resources to protract the review of obviously rational agency decisions whenever close analytical dissection of the agency's explanatory language and the imagination of counsel can develop arguments for which the opinion itself contains no express refutation.

The Commission's explanation of its determination not to give its new prospective cross-ownership policy full retrospective effect by requiring broad divestiture, is more than adequate to show that the determination was not irrational. It requires little explanation to establish the rationality of a determination not to change long-standing policy, or to grandfather existing relationships when adopting new policy in the absence of a showing of affirmative need for divestiture. Such decisions are essentially self-justifying, especially where as in the present case they reflect a consistent application of the agency's fundamental licensing policy. The Solicitor General's contention that the Commission's grandfathering is not "automatically reasonable" like grandfathering by other agencies because broadcast licensees do not acquire rights in their licenses beyond the license term, is unfounded and unsound. In addition, the potential adverse consequences of divestiture articulated by the Commission set forth a rational basis for the decision to grandfather in this case, notwithstanding the elaborate argumentative efforts to discredit them mounted by the Court of Appeals and echoed by its supporters in this Court.

A. The Commission's Decision to Grandfather Required No Special Justification.

As shown at length in our main brief,[3] the proposal to divest all existing cross-owners would have changed an established policy favoring meritorious existing cross-ownership that has consistently coexisted with the Commission's long-standing emphasis on diversification of ownership where prospective cross-owners are concerned. This different policy toward incumbent cross-owners with good records of performance reflects the sharp distinction drawn in the Commission's overall licensing policy between prospective licensing on the one hand and continued licensing of broadcast owners who have served the public interest on the other. In addition, the Commission has in the past routinely grandfathered existing relationships or otherwise sought to avoid extensive divestiture when adopting new policies, thereby reflecting an underlying bias of the legal system against disappointing expectations built on existing policy or disrupting lawful arrangements in the absence of a strong affirmative showing of need.[4] For these reasons, the Commission properly proceeded on the premise that it was divestiture, and not grandfathering, that required affirmative justification in this case. *Second Report and Order*, ¶¶ 99, 108, 112 nn.29, 30 (J.A. 188-90, 196-97, 200-02).

The Solicitor General concedes that grandfathering is "routinely employed by legislatures and by administrative agencies to protect legitimate expectations,"

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[3] Brief for Petitioners Channel Two Television Company, *et al.*, at 27-35.

[4] *Id.* at 35-44.

and that its employment "is a reasonable means of implementing policy changes." (Brief for the United States at 47). But he contends that grandfathering by the FCC is a special case, not entitled to such routine treatment, because the Communications Act provides that a broadcast license does not "create any right, beyond the terms, conditions, and periods of the license," and that a broadcast licensee has no "claim to the use of any particular frequency . . . because of the previous use of the same. . . ." 47 U.S.C. §§ 301, 304. The Solicitor General asserts that these provisions deny broadcast licensees "the sort of interest that would make grandfather treatment by the Commission automatically reasonable." (Brief for the United States at 47-48).

This argument is without precedent and without merit. The cited provisions of the Communications Act establish that the mere fact of incumbency, without more, does not entitle a licensee to renewal. Renewal is to be determined by reference to the standard of the public interest, convenience and necessity, and may be granted only if the Commission finds, after reviewing the record of the licensee's performance during the license term, that renewal would serve the public interest. The provisions relied on by the Solicitor General make clear that, if the Commission properly does not so find, no right or claim of the licensee has been infringed by nonrenewal of his license. *See Ashbacker Radio Co.* v. *FCC*, 326 U.S. 327, 331-32 (1945); *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 475, *rehearing denied*, 309 U.S. 642 (1940); *Federal Radio Comm'n* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 282 (1933) (decided under the predecessor statute).

These provisions have never been construed to mean that the Commission may not give consideration to the equities of incumbent licensees whose performance it finds has been in the public interest, whether in rule-making proceedings or otherwise. On the contrary, the Court of Appeals below has in the past gone so far as to recognize that meritorious licensees may acquire "legitimate renewal expectancies," which the Commission is *required*, not merely permitted, in some measure to protect.[8] Even if such protected expectancies were forbidden, not required, it would not follow that the Commission is deprived of discretion even to consider such interests, much less that its general administrative discretion to grandfather when adopting changes in policy is uniquely curtailed.

The rationality of commonplace administrative and legislative grandfathering does not rest on the assumption that the beneficiaries have a right or claim that is entitled to protection. It is clear that in many cases of grandfathering, while the agency has discretion to grandfather routinely, it also has discretion *not* to grandfather if it concludes there is a sufficient public interest need for giving its new policy full retrospective effect. Apart from the general considerations of fairness in seeking to avoid disappointing expectations built on established policy, grandfathering is an elementary tool of legislative rule-making because it gives the agency flexibility to experiment and adapt to changing circumstances without having to confront the

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[8] Greater Boston Television Corp. v. FCC, 444 F.2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923, *rehearing denied*, 404 U.S. 877 (1971); Alianza Federal de Mercedes v. FCC, 539 F.2d 732, 736 n.9 (D.C. Cir. 1976).

resistance and the disruption that would be occasioned by uprooting existing relationships. Such flexibility to act prospectively is vital to an agency, as to a legislature, quite apart from any interests or claims of equity on the part of those who are grandfathered.[6]

The Solicitor General's argument that the Commission is uniquely disqualified from routine grandfathering also fails to come to grips with the fact that the Commission has routinely grandfathered in the past. The Solicitor General cites several cases in which the Commission has not grandfathered, but ignores the numerous cases cited in our main brief where it has done so or has acted expressly to minimize the need for divestiture in adopting new policies.[7] Indeed, in this very proceeding, the Commission routinely decided to grandfather all existing cross-ownerships of radio and television stations, barred prospectively since 1970 under the *First Report and Order* in this proceeding (J.A. 33-100), with substantially less explanation than it gave for grandfathering most newspaper-broadcast cross-owners (*Second Report and Order*, ¶ 30, J.A. 150-51), and no party even appealed the decision. The fact is that, if the Commission had grandfathered newspaper cross-owners by noticing only prospective rules, as it did in the 1968 Notice of Proposed Rule-making that began the present proceeding,[8] the ques-

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[6] *See* cases cited in Brief for Petitioners Channel Two Television Company, *et al.*, at 42 n.64.

[7] *Id.* at 36-37 nn.53, 54.

[8] Multiple Ownership of Standard, FM, and Television Broadcast Stations, Notice of Proposed Rule-making, 33 Fed. Reg. 5315 (1968). The 1968 Notice proposed rules to bar broadcast cross-ownerships (radio-television and AM-FM radio) on a prospective basis only. These prospective rules were adopted in the First Report

tion of its authority to grandfather without explanation would not even have been presented for judicial review.

Finally, the Solicitor General's argument does not take account of the extent to which grandfathering in this case is supported by the traditional distinction the Commission draws in its licensing policy between new applicants and meritorious incumbents—a distinction based on the Commission's view of the public interest in the best practicable broadcast service.[9] The Solicitor General obscures this difference by repeating the erroneous assertion of the Court of Appeals that the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965), has been applied to comparative *renewals* (Brief for the United States at 5)—misciting *Seven (7) League Productions, Inc.*, 1 F.C.C.2d 1597 (1965), both for that proposition and in a different context as well.[10] The Solicitor Gen-

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and Order. (J.A. 33-100). The Commission then proposed divestiture rules for such broadcast cross-ownerships in its 1970 Further Notice of Proposed Rule-making (J.A. 101-26), but declined to adopt them in the Second Report and Order under review in this proceeding. (J.A. 150-51).

[9] *See* Brief for Petitioners Channel Two Television Company, *et al.*, at 25-35.

[10] In *Seven (7) League Productions*, the 1965 Policy Statement ment was applied only to the introduction of evidence in comparative renewal hearings. As the Commission has made clear, that holding did not mean that the standards of the Policy Statement would be applied in deciding the merits of comparative renewal licensing decisions. *See* Brief for Petitioners Channel Two Television Company, *et al.*, at 34 n.51.

The Solicitor General also incorrectly cites *Seven (7) League Productions* as a case in which the Commission declined to issue a broadcast license to a person publishing a newspaper in the same community. (Brief for the United States at 15). In fact, the case had nothing whatever to do with newspaper-broadcast cross-ownership.

eral does acknowledge that the Commission properly accords an "expectation of renewal" on the basis of a good record of past performance, but he mistakenly contends that only "truly superior service" is sufficient to support such an expectation. (Brief for the United States at 48-50). That contention is based on dicta in a Court of Appeals decision that did not bind the Commission and does not reflect the Commission's long-standing policy and construction of its public interest mandate.[11]

The Solicitor General also makes the general point that, under the *Chenery* doctrine,[12] a court should not consider justifications for an agency's decision that were not relied on by the agency. (Brief for the United States at 45). It is unclear how this principle could apply (or whether the Solicitor General intended it to apply) to the argument that the Commission's grandfathering was "automatically reasonable," [13] as the Solicitor General indicates it would have been if adopted by another agency. The Court of Appeals had no difficulty in perceiving that the Commission was presuming the rationality of grandfathering absent a showing of need for divestiture, although it held that the Commission's presumption was impermissible. If the presumption was indeed "automatically reasonable" as shown above, it would be empty formalism to insist that the agency must say so expressly before a court can

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[11] *See* Brief for Petitioners Channel Two Television Company, *et al.*, at 32 n.50 and cases cited therein.

[12] SEC v. Chenery Corp., 318 U.S. 80 (1943).

[13] The Solicitor General's only response to the argument is addressed in terms of the narrow contention that the Commission should not be upheld on the basis of the "expectancy interest" of existing licensees. (Brief for the United States at 46-51).

affirm the agency's policy determination on that basis or take account of its inherent rationality in evaluating the explanation the agency gave.

In short, the Solicitor General's brief fails to refute the Commission's evident premise that the burden of justification rested upon those who proposed divestiture, and that in the absence of any such justification other than the Commission's long-standing diversity policy the rationality of grandfathering required no special justification.

B. The Specific Potential Adverse Consequences of Divestiture Articulated by the Commission Rationally Support Its Grandfather Rules.

Notwithstanding its premise that the burden of justification was on the proponents of divestiture, the Commission concluded that broad divestiture would or could have concrete adverse public interest consequences which, taken together, outweighed the presumed gain in diversity from breaking up existing cross-ownerships. The Solicitor General concedes that the Commission could validly conclude that some public interest considerations are more important than diversification of ownership. (Brief for the United States at 34). He recognizes that the choice among public interest considerations is for the Commission to make unless its decision is arbitrary or internally inconsistent. (*Id.* at 35). But following the Court of Appeals, he contends that the policies and concerns identified by the Commission are so inconsequential and unfounded that the Commission could not rationally prefer them to a presumed increase in diversity. (*Id.* at 36-46).

In part, this contention rests on a misunderstanding of the Commission's emphasis on the importance of

diversity in adopting the prospective rules. The Commission regarded "true diversity"—diversity of information and opinion expressed through the media—as a primary public interest objective served by its prospective rules. *Second Report and Order*, ¶¶ 99-101 (J.A. 188-91). It relied upon a presumption that diversification of media ownership would bring about some increase in true diversity—thus yielding an "abstract" or presumed gain in every case, even if in fact the actual effect in any particular case might be a negligible gain or no gain or even a net loss. It does not follow from the importance of the ultimate objective that this abstract gain in diversity in any particular case is of transcendent importance. The Commission plainly thought, and said, that it was not. *Id.*, ¶ 108 (J.A. 196-97). The Commission takes the view that "51 [licensees in a market] are more desirable than 50,"[14] but it obviously does not believe that the presumed gain in diversity from adding the fifty-second separate voice is of anything approaching equal importance to the gain from adding a second licensee in a one-station market. The Commission opted for diversity in adopting its prospective rules no matter how small or abstract the "hoped for" gain might be,[15] not because such a gain was all-important but because the Commission concluded that there was now so little to be lost by barring *additional* newspaper cross-ownerships that even the possibility of a small gain in the important objective of true diversity should prevail.[16] As the Commission said repeatedly, there was more to

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[14] First Report and Order, ¶ 21 (J.A. 43).

[15] Second Report and Order, ¶ 109 (J.A. 198).

[16] *Id.*, ¶¶ 100-04 (J.A. 190-93).

be lost where divestiture of meritorious licensees was concerned, and the balance of public interest considerations was necessarily different."

Whether or not a model agency opinion would have more fully elaborated this view, the Commission's "path may reasonably be discerned." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., supra,* 419 U.S. at 286. And it could only trivialize the process of appellate review to send the opinion back to the Commission so that it can rephrase the hyperbolic declaration that "nothing can be more important" than maximizing diversity—a misworded sentence which the Court of Appeals and the Solicitor General both say is not to be taken literally, but which is nonetheless the centerpiece of their contention that the Commission's opinion reflects an internally inconsistent analysis of the importance of diversity.

In part, this contention also rests on an argumentative and unfair disparagement of the specific countervailing public interest considerations articulated by the Commission. The Commission relied primarily on the unusual continuity of service displayed by the long-established newspaper cross-owners as a group, together with corroborative indications that these licensees provide a specially valuable broadcast service.[16]

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[17] *Id.*, ¶¶ 99, 108-09, 112 n.30 (J.A. 188-90, 196-98, 202).

[18] The Solicitor General insists that the Commission did not rely on any superiority of service from existing cross-owners. (Brief for the United States at 45-46). In fact, the Commission said:

> "In our view, stability and continuity of ownership do serve important public purposes. Traditions of service were established and have been continued. Entrance and exit from broadcast ownership by these parties are determined by factors other than just profit maximization. Many began operation long before there was hope of profit and were it not for their efforts

As shown in our main brief [19] and in the Commission's brief as petitioner,[20] the Commission has previously recognized the importance of such continuity for reasons not understood by the Court of Appeals. This showing is not met by the arguments of the Solicitor General or the other briefs that track the court's arguments on this point.

Instead, the Solicitor General directs his principal fire at two peripheral considerations mentioned by the Commission—the possible loss of local ownership in some cases and the possibility of economic dislocations affecting broadcast service as a result of a suddenly increased demand for broadcast capital in the event of broad divestiture. The Commission's entire discussion of each of these considerations is confined to a single sentence. *Second Report and Order,* ¶ 108 (J.A. 197). The Solicitor General treats them as if they were the main points of the Commission's argument, and devotes the bulk of his attack on the Commission's rationale to an elaborate attempt to show that these con-

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service would have been much delayed in many areas. Particularly in connection with a number of entities, there is a long record of service to the public. Under what circumstances then, should such ownership be disturbed? We have concluded that a mere hoped for gain in diversity is not enough." Second Report and Order, ¶ 109 (J.A. 197-98) (footnote omitted).

The Commission then noted that the existing newspaper cross-owners broadcast more news, public affairs, and other local programming that the Commission considers important to the public interest than does the average licensee. *Id.* at n.26 and Appendix C (J.A. 198, 230).

[19] Brief for Petitioners Channel Two Television Company, *et al.*, at 45-48.

[20] Brief for Petitioner Federal Communications Commission at 23-26.

siderations, standing alone, are unlikely to be of great significance to the public interest. (Brief for the United States at 37-43). The Commission's principal articulated concerns are discussed last and least. (*Id.* at 43-46). This attempt to discredit the Commission's rationale by overkill on minor points does not establish that it was improper for the Commission even to consider these points or to refer to them as additional possible adverse effects of divestiture in concluding that disrupting the continuity of the specially valuable service provided by existing cross-owners would not serve the public interest.[21]

In sum, the inherent rationality of the Commission's decision to grandfather aside, the Commission said enough in its opinion to show that its decision is rationally supported by the prospect of specific adverse consequences of broad divestiture. Under the proper standard of judicial review, no more is required.

C. The Commission's Treatment of Existing Cross-Owners Is Otherwise Rational.

Respondent NCCB makes the additional arguments, not supported by the Solicitor General, that the Commission's standard for determining which cross-owners should be divested, and its announced policy governing future petitions to deny renewal of the licenses of grandfathered cross-owners based solely on grounds of structural concentration in the market, are both irrational. These arguments are unpersuasive.

The Court of Appeals held that even if the Commission properly determined that broad divestiture was

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[21] *See* Brief for Petitioners Channel Two Television Company, *et al.*, at 48-49.

not required, it acted irrationally in ordering divestiture of newspaper-broadcast combinations in cases of "effective monopoly," where either the only newspaper and television station or the only newspaper and radio station in a market not served by a television station are commonly owned. The court's view was that "[d]ivestiture . . . may be more useful in the larger markets" than in the monopoly markets (J.A. 430). As the Solicitor General points out, this holding improperly substitutes the court's judgment for that of the Commission, and "[t]he Commission's determination . . . is unquestionably rational as a matter of policy." (Brief for the United States at 51 n.44).

NCCB complains that the Commission acted irrationally in failing to use "Sherman Act or other monopoly definitions" (NCCB Brief at 46) in determining where divestiture would be ordered, asserting without citation that a number of cross-owners who passed the Commission's diversity test have prima facie monopoly shares under Sherman Act standards. (*Id.* at 47 n.62). The Commission's standard of "effective monopoly" is based on considerations of economic competition as well as on the Commission's primary diversity concern.[22] But adjudication of Sherman Act monopoly claims requires resolution on a case-by-case basis of difficult issues of product and geographic market definition, and other complex evidentiary questions. It was plainly rational for the Commission to decide not to attempt to resolve such issues in this rule-making pro-

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[22] Second Report and Order, ¶¶ 11, 112-16 (J.A. 140-41, 200-09). The Commission said its focus was on markets in which there appeared to be "a lack of diversity that reaches a point sufficient to constitute an effective monopoly in the marketplace of ideas as well as economically." Id., ¶ 112 (J.A. 203).

ceeding. Instead, the Commission made clear that it would consider the public interest consequences of properly supported allegations of economic monopolization under the Sherman Act in hearings on petitions to deny renewal to grandfathered cross-owners,[23] where the result could be not merely divestiture but outright forfeiture of the license. While this may be cause for complaint by grandfathered licensees, it is difficult to see how it reflects any irrational denigration of antitrust concerns.

NCCB then complains that the Sherman Act monopoly standard the Commission said it would apply to future petitions to deny is too restrictive (*id.* at 48-53), even though according to NCCB the application of such a standard would dispossess a number of licensees which the Commission decided should not be divested on grounds of diversity. (*Id.* at 47 n.62). While the thrust of this argument is not entirely clear, it appears to reflect the Court of Appeals' misconception that the Commission "abandoned its former policy of allowing petitioners to deny the opportunity to demonstrate in any one of several ways that cross-ownership harms the public interest," and that the Commission's monopolization standard does not allow "showings of harm in individual markets" resulting from cross-ownership.[24] In fact, the Commission's standard gov-

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[23] Id., ¶ 130 (J.A. 218-19). Although allegations of economic monopolization under the Sherman Act trigger such hearings, the Commission does not seek to enforce the antitrust laws as such but to apply the public interest standard of the Communications Act. *See* Second Report and Order,¶ 110 (J.A. 198-99); United States v. R.C.A., 358 U.S. 334, 350-52 (1959).

[24] NCCB Brief at 49-50; *see* J.A. 428-29 n.108.

erning petitions to deny applies only to petitions relying on grounds of structural concentration alone. Allegations of abuse or actual harmful effects of cross-ownership in any market will still be entertained.[25]

Nor is it accurate to say that the Commission's Sherman Act standard irrationally "substitute[s] an anti-trust standard" for a standard based on diversity. (*Id.* at 49). The Commission has in this proceeding ordered divestiture in all those cases where it concluded that separation of existing cross-ownerships was required on grounds of diversity. While it is conceivable that the structure of a grandfathered market could change so as to call for divestiture under the "effective monopoly" standard employed in the present proceeding, it was hardly irrational for the Commission to conclude that it would not treat such a hypothetical change as a ground for forfeiture.

NCCB also contends that the Commission has not in fact been applying its Sherman Act monopolization standard with sufficient liberality, citing a recent Commission decision setting a hearing on a petition to deny renewal of a grandfathered cross-ownership only on grounds of abuse. (*Id.* at 50-52). At most, this argument amounts to a claim that the standard enunciated in the *Second Report and Order* was improperly applied in that case, not that it is irrational as articulated. Whether the Commission misapplied its standard in some subsequent renewal proceeding is a question to be resolved on review of that proceeding, and has no

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[25] Second Report & Order, ¶ 130 (J.A. 218-19); *and see, e.g.*, WGAL-Television, Inc., 62 F.C.C.2d 527, 531 (1976).

relevance to the question of the validity of the standard itself now before this Court."[25]

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[25] The Brief of Amici Office of Communication of the United Church of Christ, *et al.*, contends that the Commission has not properly applied its Sherman Act monopolization standard in other individual renewal cases. These arguments are likewise irrelevant to the question of the rationality of the standard as articulated by the Commission in the rule-making under review in this proceeding. Moreover, the grounds of Amici's contention are all unsupported allegations of fact which cannot be considered or adjudicated here. In one instance (the challenge to renewal of the license of Cox Broadcasting Corp. in Atlanta) the allegations have not yet been passed upon by the Commission. In the others, the Commission rejected the principal allegations of monopolization as insufficient on their face and found that the other contentions were not sufficiently supported by specific allegations of fact, as is required under Section 309(d)(1) of the Communications Act. 47 U.S.C. § 309(d)(1). *See* Newhouse Broadcasting Corp. (WSYR-TV), 51 F.C.C.2d 336, 345 (1975), *appeal pending*, D.C. Cir. No. 75-1308; Newhouse Broadcasting Corp., (WAPI-TV), 59 F.C.C.2d 218, 237-38 (1976), *opinion on reconsideration*, 61 F.C.C.2d 718, 720 (1976); Newhouse Broadcasting Corp., (WSYR-TV), 62 F.C.C.2d 271, 277-78 (1976).

While this is not the forum in which to evaluate the Commission's treatment of these allegations, it should be noted that the Commission relied on this Court's definition of monopoly in United States v. Grinnell Corp., 384 U.S. 563 (1966), where the Court said:

> "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Id.* at 570-71.

Amici complain that the Commission refuses to infer the second element of this definition from evidence of the first element. (Brief of Amici Office of Communication of the United Church of Christ, *et al.*, at 15). Their sole support for this assertion is the district court opinion in *Grinnell*, which the Supreme Court expressly declined to affirm on this point. 384 U.S. at 576 n.7.

CONCLUSION

For the foregoing reasons, the Commission's rules providing for grandfathering should be affirmed.

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